NO. 164P17 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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WASCO LLC, Petitioner-Appellant, v. N.C. DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, DIVISION OF WASTE MANAGEMENT, Respondent-Appellee.	)	From Wake County No. COA 16-414

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RESPONSE TO PETITION FOR DISCRETIONARY REVIEW

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RESPONSE TO PETITION FOR DISCRETIONARY REVIEW

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TO: THE HONORABLE SUPREME COURT OF NORTH CAROLINA

Respondent-Appellee the North Carolina Department of Environmental Quality,[1] Division of Waste Management ("Division") responds to WASCO LLC's ("WASCO") Petition for Discretionary Review, and moves that the petition be denied.

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[1] The North Carolina Department of Environment and Natural Resources has been renamed the Department of Environmental Quality effective 18 September 2015.

INTRODUCTION

Contrary to WASCO's assertion in its Petition for Discretionary Review, this case does not have significant public interest, nor does it involve legal principles of major significance to the jurisprudence of the State. This case is about whether WASCO, based on the specific set of facts and circumstances present here, is responsible for ongoing environmental remediation and post-closure care of a hazardous waste landfill. Through a long history of words and actions, WASCO acquired and retains that environmental liability. The Office of Administrative Hearings ("OAH"), the superior court, and the North Carolina Court of Appeals each carefully examined the extensive factual record and reached the same conclusion: WASCO is an operator of the landfill for purposes of the post-closure permitting requirements at the subject site.

This case arises under a highly technical set of detailed hazardous waste regulations and a narrow set of site-specific facts. Accordingly, if this Court were to review and ultimately decide this case, the outcome would only apply to WASCO's obligations regarding a single hazardous waste site, and would have limited, if any, precedential value. Because its implications are so limited, this case does not meet the statutory criteria for discretionary review by this Court, and WASCO's petition should be denied.

PROCEDURAL HISTORY

In a letter dated 16 August 2013, concerning the requirements of the State Hazardous Waste Program, the Division's Hazardous Waste Section ("the Section") stated that WASCO was an "operator" of a landfill and needed to obtain a post-closure permit. (Doc. Ex. 87) WASCO disputed this assertion and filed a Petition for a Contested Case Hearing in OAH. (Doc. Ex. 1-11)

After an exchange of written discovery, but prior to the discovery deadline, the Division moved for summary judgment. (Doc. Ex. 12-13) WASCO filed a motion under N.C.G.S. § 1A-1, Rule 56(f), requesting an extension of time to respond until after it had taken the Section's deposition. (Doc. Ex. 1259-62) The administrative law judge ("ALJ") denied WASCO's Rule 56(f) motion. (R pp 17-18)

On 2 January 2015, the ALJ entered its Final Decision granting summary judgment to the Division. (R pp 9-16) WASCO filed a timely Petition for Judicial Review. (R pp 2-8)

Following briefing (R pp 22-83, 88-103) and arguments by the parties (R p 105), the Honorable G. Brian Collins, Jr., entered a final order and judgment denying WASCO's petition for judicial review and affirming both the ALJ's interlocutory order on the Rule 56(f) motion and the ALJ's Final Decision. (R pp 105-23)

WASCO appealed to the North Carolina Court of Appeals; and, after oral argument from the parties, in a published opinion filed on 18 April 2017, the Court of Appeals (McCullough, Stroud, Zachary) affirmed the final order and judgment of the superior court.

WASCO has now filed a petition for discretionary review with this Court.

STATEMENT OF FACTS

A. Legal Framework

Subtitle C of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901 to 6992k (1976), governs the management of hazardous waste through its generation, transportation, treatment, storage, and disposal, including the clean-up of hazardous waste contamination. RCRA allows the United States Environmental Protection Agency ("EPA") to authorize a state to operate its own hazardous waste program in lieu of the federal program, provided that a state program is at least as stringent as the federal program. 42 U.S.C. § 6926; (Doc. Ex. 1216). EPA has authorized North Carolina to operate its own state hazardous waste program. 49 Fed. Reg. 48694 (Dec. 14, 1984).

The State Hazardous Waste Program consists of two coordinate parts—the Solid Waste Management Act ("the Act"), N.C.G.S. Chapter 130A, Article 9, and the Hazardous Waste Management Rules ("the Rules"), 15A NCAC Subchapter 13A. The Act mandates the adoption of rules to implement that

program, and requires the Section to enforce the rules promulgated thereunder. N.C.G.S. § 130A-294(b). Consistent with its statutory authority, the Section has promulgated specific rules related to various subsets of the State Hazardous Waste Program, including the rule at issue here. These rules largely adopt and incorporate the federal RCRA regulations by reference.

Broadly, in accordance with RCRA, the State Hazardous Waste Program regulates the generation, treatment, storage, and disposal of hazardous waste; closure of hazardous waste management units; and cleanup of "post-closure" contamination. Post-closure regulations require (a) maintenance of landfill units; (b) groundwater monitoring and reporting; (c) corrective action associated with any sources of contamination at a facility; and (d) up-front financial assurance for the entire projected cleanup costs as a contingency, subject to amendment if the costs change. See generally 15A NCAC 13A .0109(h) (adopting 40 C.F.R. § 264.117).

Specifically relevant to this case is the State Hazardous Waste Program's requirement that "operators" of hazardous waste management units closed as landfills with waste in place obtain a post-closure permit or Administrative Order on Consent in lieu of a permit. 15A NCAC 13A .0113(a) (adopting 40 C.F.R. § 270.1(c)). When a tank system is removed but "not all contaminated soils can be practicably removed or decontaminated," then "such a tank system

is then considered to be a landfill." 15A NCAC 13A .0110(j) (adopting 40 C.F.R. § 265.197(b)).

B. Facts

Decades ago, an underground storage tank containing used dry cleaning solvent (perchloroethylene) leaked at a former textile manufacturing facility located in Swannanoa, North Carolina, which is now associated with EPA Identification Number NCD 070 619 663 ("the Facility"). (Doc. Ex. 259-321) The tank was removed and the pit backfilled as a landfill with contaminated soil left in place, after which time post-closure care began. (See, e.g., Doc. Ex. 331-56) In 1995, the owner of both the contaminated land and the knitwear business responsible for the contamination, Winston Mills, sold the property. An affiliate of Winston Mills' parent company known as Culligan International Company ("Culligan") agreed to assume Winston Mills' environmental remediation obligations in exchange for interests valued at $9 million. (Doc. Ex. 391-427) Culligan contacted the Section, pledged to take responsibility for the contamination, and began performing post-closure operations related to the Facility, including installation and operation of two groundwater cleanup systems. (Doc. Ex. 391-427, 597)

WASCO became involved with the Facility following its 1998 acquisition of Culligan. (Doc. Ex. 88-127) Between 1999 and 2004, WASCO's role included supplying financial assurance to the Section on behalf of Culligan for post-

closure care associated with the Facility, including a Trust Agreement and Irrevocable Standby Letter of Credit in 2003. (Doc. Ex. 441-88)

Culligan was divested from WASCO in 2004. (Doc. Ex. 430-31, 435-40, 761) Following the 2004 divestiture, Culligan represented in a letter to the Section that WASCO was "assuming responsibility" for the Facility. (Doc. Ex. 129-30)

Until the initiation of the present litigation in 2013, WASCO communicated directly and regularly with the Section about ongoing environmental remediation activities at the Facility (Doc. Ex. 67-79, 129-92, 1240-41, 1243-45); signed and submitted permit applications as the Facility's operator (Doc. Ex. 261-74, 276-79, 281-91); paid for and directed the activities of an environmental consultant that performed work at the Facility including operation and maintenance of the environmental remediation system, sampling of groundwater, and preparation of reports for submission to the Section (Doc. Ex. 153, 163, 169, 175, 532-863, 756-70, 878-82, 909, 931, 940, 942, 944, 954, 947, 950, 973-74, 981, 1007-21, 1023-37, 1039, 1048-1168, 1170-87); and provided and maintained financial assurance with the Section for the Facility (Doc. Ex. 489-591).

The litany of facts in the record highlighting WASCO's various activities with respect to post-closure care of the Facility are described in more detail in the Court of Appeals' opinion. *WASCO LLC v. N.C. Dep't of Env't & Natural*

Res., Div. Of Waste Mgmt., No. COA16-414, slip op. at 16-21 (N.C. Ct. App. Apr. 18, 2017).

REASONS WHY THIS COURT SHOULD DENY THE PETITION FOR DISCRETIONARY REVIEW

A petition for discretionary review brought, as here, under N.C.G.S. § 7A-31(c) must show that the subject matter of the appeal has significant public interest, that the cause involves legal principles of major significance to the jurisprudence of the State, or that the decision of the Court of Appeals appears likely to be in conflict with a decision of this Court. N.C.G.S. § 7A-31(c) (2015). WASCO does not argue that the decision of the Court of Appeals is in conflict with a decision of this Court, contending only that its case is of significant public interest and involves legal principles of major significance to the jurisprudence of the State. WASCO's arguments are without merit.

I. The Subject Matter of the Appeal is Not of Significant Public Interest.

This case concerns the very narrow issue of whether WASCO's actions, under the specific set of circumstances in the case at bar, require it to obtain a post-closure permit at the hazardous waste management unit closed as a landfill. While the definition of "operator" is important to the Hazardous Waste Program, post-closure care of hazardous waste facilities is a highly

specialized and detailed regulatory area, not a subject of broad and significant public interest.

Not only is the relevant area of regulation technical and highly specialized, but the facts of this case are also specific and unique, even in the limited context of post-closure permitting of closed hazardous waste facilities. The Court of Appeals opinion, in concert with the decisions of OAH and the superior court below, was largely fact-based. The Court included a detailed recitation of the pertinent facts in applying the "totality of the circumstances" approach to determining whether WASCO is an operator, the same test employed by federal courts to determine operator environmental liability under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601 to 9675 ("CERCLA"). *WASCO LLC*, slip op. at 16-21 (noting guidance articulated in federal law under *United States v. Bestfoods*, 524 U.S. 51, 141 L. Ed. 2d 43 (1998)). By WASCO's own admission, the definitional elements of "operator" under the Solid Waste Management Act are fact-intensive. (Pet. at 2-6) Thus, because of the fact-specific and narrow nature of the case, the matter does not implicate substantial public interests as WASCO contends.

Moreover, WASCO seems to conflate significant public interest with its own financial interest. By its own words, WASCO asserts that "the decision of the Court of Appeals now threatens to expose WASCO to millions of dollars for

other [environmental liability]." (Pet. at 21-22) While the impact of the Court of Appeals decision may be of significance to WASCO's interests, it is not significant to the public interest.

Only because of its self-interest in its long-term environmental liability and associated financial impact is WASCO now seeking review by this Court in an attempt to litigate its way out of its legal obligation to clean up a hazardous waste landfill. Per its petition, WASCO would have this Court conduct yet another fact-specific review of WASCO's long history of actions and words, all of which lead the Court of Appeals to unanimously conclude that "WASCO was the party responsible for and directly involved in the post-closure activities subject to regulation" and "is an operator of a landfill for purposes of the post-closure permitting requirement at the Site." *WASCO LLC*, slip op. at 22.

II. This Case Does Not Involve Legal Principles of Major Significance to the Jurisprudence of the State.

This case does not involve legal principles of major significance to the jurisprudence of the State for many of the same reasons that it lacks significant public interest. WASCO's petition grossly overstates the impact to the jurisprudence of the State, and, rather than articulating the import to the general jurisprudence of the North Carolina, simply regurgitates the same incorrect merits arguments it made to the Court of Appeals.

This case is, as WASCO calls it, "unprecedented," but only in that it represents the lone reported case in North Carolina in which the definition of the term "operator" under the Solid Waste Management Act and related regulations has been examined. WASCO is therefore wrong that the Court of Appeals' opinion creates "enormous legal uncertainty." (Pet. at 16) To the contrary, in light of WASCO's long history of behaving like an operator, allowing WASCO to avoid its environmental remediation obligations for a landfill would create legal uncertainty.

Moreover, as discussed above, this case involves highly technical and complex regulations that have very specific application. The interpretation of the term "operator" requires an intensive, fact-based inquiry and analysis. Under different facts, the outcome under the same law could have been completely different. Accordingly, the impact of this decision will have little, if any, impact on the jurisprudence of the State. Given the highly specialized and technical nature of the subject regulations and the fact-dependent and site-specific analysis necessary to determine operator liability, this case does not involve legal principles of major significance to the jurisprudence of the State.

WASCO's argument that the Court of Appeals decision is significant to the jurisprudence of the State because it creates legal uncertainty is also baseless. The decision is not in conflict with any opinions of this Court or other

Court of Appeals opinions, nor does WASCO allege that it is. Thus, to assert that the decision creates ambiguity is erroneous. Furthermore, a review of the decisions below plainly indicates that all three courts looked at the totality of the circumstances, undertook a careful review of the facts under the applicable law, and reached the identical conclusion that WASCO's actions and words clearly showed that WASCO is an operator of a landfill for purposes of the post-closure permitting requirements at the subject site. (Pet. at 2-6) WASCO may not agree with the Court of Appeals' reasoning or ultimate decision, but that does not mean that the opinion is ambiguous or creates uncertainty. To the contrary, the Court of Appeals was clear – in light of the facts of this case, WASCO is an operator of a landfill for purposes of the post-closure permitting requirement at the Facility. *WASCO LLC*, slip op. at 22.

As discussed above, the Court of Appeals holding only applies to an entity whose words and actions, when taken in light of the totality of the circumstances, indicate that it is responsible for environmental remediation of a closed hazardous waste landfill. As a result, review by this Court would add nothing to the body of law of the State. Instead, review by this Court would merely give WASCO another bite at the apple to argue why it should be absolved of responsibility for post-closure environmental remediation of the Facility it has operated for years. Because this is not a case with broad implications for the jurisprudence of the State, the petition should be denied.

CONCLUSION

WHEREFORE, the State moves that petitioner-appellant's petition for discretionary review be denied.

Electronically submitted this the 2nd day of June, 2017.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing RESPONSE TO PETITION FOR DISCRETIONARY REVIEW has been filed pursuant to Appellate Rule 26 with the Clerk of the North Carolina Supreme Court by electronic submission.

I further certify that a copy of the foregoing RESPONSE TO PETITION FOR DISCRETIONARY REVIEW has been served upon counsel for the Petitioner-Appellant by sending it electronically to counsel's current email address:

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This the 2nd day of June, 2017.

/s/ Electronically submitted
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